IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3142 OF 2017

JCB India Limited
A limited company incorporated
under the Companies Act and
having its office at Talegaon,
M.I.D.C., Tal – Maval,
District – Pune. .... Petitioner

- Versus -

1. Union of India
   represented through Union
   Secretary, Department of Revenue,
   Ministry of Finance, 3rd Floor,
   Mittal Court, Nariman Point,
   Mumbai – 400 021.

2. The Goods and Service Tax Council
   represented through its Chairman
   having its office at 5th Floor,
   Tower II, Jeevan Bharti Building,
   Janpath Road, Connaught Place,
   New Delhi – 110 001.

3. The Commissioner Central Tax
   GST Pune -1, 2nd Floor, D-Wing,
   41-A, Sasoon Road, Opp. Wadia
   College, Pune – 411 001. .... Respondents

WITH

WRIT PETITION NO.3186 OF 2017

Suyaan Infrastructure Pvt. Ltd.
incorporated under the Companies
Act having its registered address -
A-6, NICE Area, MIDC – Satpur,
Nashik – 422 007. .... Petitioner

- Versus -

1. Union of India
   represented through Union
   Secretary, Department of Revenue,
   Ministry of Finance, 3rd Floor,
   Mittal Court, Nariman Point,
   Mumbai – 400 021.

2. The Goods and Service Tax Council
   represented through its Chairman
   having its office at 5th Floor,
   Tower II, Jeevan Bharti Building,
   Janpath Road, Connaught Place,
   New Delhi – 110 001.

3. The Commissioner Central Tax
   GST Nasik, Goods & Service Tax
   Department, GST Bhavan,
   Pathardi Phata, Nasik. .... Respondents

WITH

WRIT PETITION NO.3212 OF 2017

Siddharth Auto Engineers Pvt. Ltd.
A Company incorporated under the
Companies Act and having its office

at Plot No.46, Shivprasad Society,
Panmala, Sinhagad Road,
Pune – 411 030. .... Petitioner

- Versus -

1. Union of India
   represented through Union
   Secretary, Department of Revenue,
   Ministry of Finance, 3rd Floor,
   Mittal Court, Nariman Point,
   Mumbai – 400 021.

2. The Goods and Service Tax Council
   represented through its Chairman
   having its office at 5th Floor,
   Tower II, Jeevan Bharti Building,
   Janpath Road, Connaught Place,
   New Delhi – 110 001.

3. The Commissioner Central Tax
   GST Pune -1, 2nd Floor, D-Wing,
   41-A, Sasoon Road, Opp. Wadia
   College, Pune – 411 001. .... Respondents

WITH

WRIT PETITION NO.3187 OF 2017

Ratnapprabbha Motors
A Partnership Firm incorporated
under the Indian Partnership Act
and having its office at Plot
No.E-32, Chikalthana MIDC
Aurangabad – 431 210. .... Petitioner

- Versus -

1. Union of India
   represented through Union
   Secretary, Department of Revenue,
   Ministry of Finance, 3rd Floor,
   Mittal Court, Nariman Point,
   Mumbai – 400 021.

2. The Goods and Service Tax Council
   represented through its Chairman
   having its office at 5th Floor,
   Tower II, Jeevan Bharti Building,
   Janpath Road, Connaught Place,
   New Delhi – 110 001.

3. The Commissioner Central Tax
   GST, GST Bhavan
   Opposite Railway Station,
   Aurangabad – 431 001. .... Respondents

Mr. Vikram Nankani, Senior Counsel with Mr. Prithviraj Chauhan & Mr. Ritesh Jain i/by MJ Juris for the Petitioner in all above petitions.

Mr. Anil C. Singh, Additional Solicitor General with Mr. Pradeep S. Jetly, Mr. M. Dwivedi, Mr. Jitendra B. Mishra & Ms Geetika Gandhi for the Respondents in all above petitions.

AND

CIVIL WRIT PETITION NO.12378 OF 2017

Evergreen Seamless Pipes and Tubes Pvt. Ltd., A company registered under the Companies Act, 1956 & a Registered Dealer under the Central Excise Rules,

2002, having Warehouse at Gat
No.356, Pune Nagar Road, Kondhapuri,
Shirur, Talegaon Dhamdhere,
Pune, Maharashtra – 412 208
And having Registered office at
Evergreen House, 77/78, 2nd Main,
Chikkalaxmaiah Layout D R C Post
off Hosur Road, Bangalore-560 029,
Karnataka. .... Petitioner

- Versus -

1. Union of India,
through the Secretary, Ministry of
Finance, Department of Revenue,
North Block, New Delhi - 110 001.

2. The Commissioner of Central Taxes
GST I Commissionerate, GST Bhavan,
Opp. Wadia College, Sassoon Road,
Pune, Maharashtra – 411 001.

3. Central Board of Excise and Customs,
R.No.227-B, CBEC, Department of
Revenue, North Block,
New Delhi – 110 001. .... Respondents

WITH

CIVIL WRIT PETITION NO.14245 OF 2017

Avantor Performance Materials India
Limited, a company incorporated
under the Companies Act, 1956 and
having its place of business at B5 &
B6 Arham Logipac, Nashik Mumbai
Bypass Road, Village – Valshind,
Bhiwandi and at Survey No.177

Dhanlaxmi Compound, Opp: JK
Petrol Pump, Taluka Bhiwandi,
District Thane, through its authorised
representative Mr. Pravin Narkar .... Petitioner

- Versus -

1. Union of India
through Secretary, Ministry of Finance
(Department of Revenue) Room
No.137, North Block, New Delhi.

2. Goods And Service Tax Council
through Secretary, 5th Floor,
Tower II, Jeevan Bharti Building,
Janpath Road, Connaught Place,
New Delhi – 110 001. .... Respondents

Mr. Raghuraman with Mr. Raghvendra & Mr. Prabhakar K. Shetty for the Petitioner in WP-12378/2017.

Mr. Abhishek Adke for the Petitioner in WP-14245/2017.

Mr. M. Dwivedi with Mr. Jitendra B. Mishra for the Respondents in both Civil WPs.

CORAM: S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

DATE : MARCH 19 & 20, 2018

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.**):**

1. All these petitions were heard together and are being disposed of by this common Judgment.

2. We issue Rule on these petitions. The respondents waive service. Since an affidavit in reply is filed in Civil Writ Petition No.12378 of 2017 and which is stated to be reflecting the common stand of the respondents to the challenge, with consent of both sides, we dispose of these writ petitions by this common Judgment and Order.

3. The writ petitions filed by MJ Juris and particularly Writ Petition No.3142 of 2017, treated as the lead matter, seeks to question Clause of Section 140(3) of the Central Goods and Services Tax Act, 2017 ("CGST Act" for short).

4. The petitioner in this petition states that it is a company registered under the Companies Act and is engaged in the manufacture of Excavators, Loaders, Compactors, etc., falling under Chapter Heading 8429. The petitioner has its manufacturing facility/place of business at Plots-A & B, Talegaon Floriculture & Industrial Village, Ambi Navlakh – Umbhare, Talegaon, Dabhade, Pune-410 507 from where it supplies machines manufactured by it to its dealers located in various

parts of the country. The petitioner's manufacturing facility/factory was registered under the erstwhile Central Excise Act and the petitioner paid central excise duty on clearance of such machines from its factory. The petitioner has a Duty Paid Depot in the State of Maharashtra at Plots-A & B of the same village. The Duty Paid Depot was registered under the Maharashtra Value Added Tax Act prior to 1-7-2017, but was not registered under the Central Excise Act, 1944. Upon transitioning to GST, the petitioner's factory and depot obtained registration under GST in the State of Maharashtra.

5. That some of the machines manufactured by the petitioner were used as demo machines which were cleared on payment of excise duty by its factory and were removed on self-invoicing basis. The petitioner used to keep these demo machines at the depot after removing them from the factory and these machines were removed from the depot on need basis. The demonstration machines were removed from the depot for that purpose and which, after the demonstrations, are sold to dealers/customers. However, these machines are typically sold

when they are aged for about 2-3 years. Under the erstwhile regime, these machines were sold from the depot on payment of VAT/CST. The petitioner had in stock, at the Duty Paid Depot, machines as on 30-6-2017 which are older than twelve months, namely, on 30-6-2016 and duty paid documents are available with respect to the same. In these circumstances, under the erstwhile regime the petitioner was not required to pay excise duty again in case it removed/sold the machines from its depot. After the onset of the Goods and Services Tax ("GST") regime whereby transitional provisions were introduced with the sole intention of allowing seamless flow of credit and the supplies under the GST regime which have already suffered tax once, do not suffer them again. This GST was introduced with effect from 1-7-2017. After its introduction, various duties such as excise duty, countervailing duty, special additional duty, etc., have been subsumed under the GST regime. Unlike the erstwhile levies, the GST is payable at all stages of supply right from the manufacturer/importer to the final customer with credit of input taxes available at each stage of value addition. This essentially

makes the GST a tax only on value addition. This is to ensure elimination of cascading effect of taxes and provide a common market for all goods and services. Adverting to the Statement of Objects and Reasons, it is urged that the essential vision is to create one-nation-one-market wherein all the goods irrespective of their territory suffer the same tax and have the same costs.

6. To abolish the cascading effect, the CGST Act provides for the input tax credit eligibility in terms of these transitional provisions. Section 140(1) of the CGST Act *inter alia* provides that a manufacturer will be entitled to carry forward the closing balance of CENVAT credit, subject to certain conditions. Further, Section 140(3) of the CGST Act *inter alia* allows a registered trader to avail input tax credit of goods held in stock as on 1-7-2017, subject to certain conditions. It is submitted that upon a plain reading of the provisions and particularly Clause (iv) of sub-section (3) of Section 140, the input tax credit of stock of goods can be availed only when such goods are purchased after 30-6-2016. A trader or a depot of a manufacturer was not entitled to avail credit as the CENVAT

Credit Rules, 2004 allows credit availment only by a manufacturer or a service provider. However, there were provisions through which an importer could pass on the credit of duty paid by registration as first stage dealers. By the GST and particularly by virtue of the provisions contained in Section 140(1) and Section 140(3) of the CGST Act, a situation of inequality amongst the manufacturer and the depot/trader as far as the stock on 1-7-2017, occurs and such ineligibility of credit under the GST regime causes discrimination between the petitioner and other manufacturers. It is put to a disadvantageous position as far as the closing stock on 1-7-2017 in respect of goods lying in stock prior to 30-6-2016.

7. It is elaborated as to how a person who is not in possession of a duty paying document is also eligible to avail input tax credit on a presumptive basis, but the petitioner who is in possession of all the duty paid documents is barred from availing CENVAT credit where the invoice is issued on or prior to 30-6-2016. It is contended that non-availment of such credit was not due to the fault of the petitioner but due to

unreasonable and arbitrary cut-off date of goods lying in stock for less than one year to transition of such credit. Now, the petitioner will have to bear the burden of double taxation in case it is not allowed to transition the credit of central excise duty paid by it at the time of removal from the factory for demo machines. The petitioner has already paid excise duty on the demo machines at the time of removal prior to 30-6-2016 and will again be compelled to pay GST on supply of such goods to customers/dealers.

8. The argument is that a law cannot expect much less compel a person to perform an impossible task. If the nature of business of the petitioner is such that the cycle for supply of demo goods is 2-3 years, then, pendency of such stock was not due to the petitioner's fault. Therefore, denying the credit to the petitioner on such grounds is grossly arbitrary and bad in law.

9. It is stated that this discrimination would fail to achieve the object and which is sought to be achieved by the transitional provisions of the CGST Act, that is of eliminating the

cascading effect. The result of such provision would be that the petitioner would be forced to pay entire tax under the CGST Act on supplies without availing input tax credit of taxes paid earlier. There is no reasonable rationale beyond inflicting tax cascading effect on depot/traders while extending full credit to registered manufacturers and partial credit to traders who do not have the duty paying documents available with them. It is in these circumstances that the provisions and insofar as noted above are challenged as violating the mandate of Articles 14 and 19(1)(g) of the Constitution of India.

10. This challenge which we have summarised in the foregoing paragraphs is sought to be elaborated in the grounds set out in the Memo of the Petition.

11. Pertinently, there is no affidavit in reply to this petition.

12. The other petition being Writ Petition No.3212 of 2017 is by a petitioner having stock of machines who is further styled as a trader. The said petitioner also raises an identical

challenge. Then we have Writ Petition No.3187 of 2017 wherein the petitioner before this Court is a trader. The Writ Petition No.3186 of 2017 is also by a Private Limited Company and carrying on business of trading. This is also an entity registered under the Maharashtra Value Added Tax Act, 2002.

13. The other petition being Civil Writ Petition No.12378 of 2017 is filed by a petitioner who is a Private Limited Company registered under the Companies Act, 1956 in the State of Karnataka. It is also a registered dealer under the Central Excise Rules, 2002 and having its office at Pune. This company carries on business as a dealer. The petitioner says that it is engaged in the business of dealing, stocking, importing and supplying wide and comprehensive range of carbon alloy and stainless steel seamless pipes and tubes, including precision tubes, hydraulic and fuel injection pipes and tubes, boiler tubes and more.

14. The petitioner is registered under the provisions of Rule 9 of the Central Excise Rules, 2002 as a dealer under

Central Excise in Pune. The registration is obtained with effect from 13-5-2008. The petitioner also applied for registration under the GST Act. After referring to Section 6 of the Central Excise Rules, 2002, it is stated that the petitioner can be termed as first stage dealer. It procures various locally manufactured goods, imported goods and these goods were sold to the customers under the prescribed documents. They pass on the incidence of duty to the customers. After inviting our attention to the CENVAT Credit Rules, 2004 and the relevant definitions therein, it is submitted that the President of India assented to the Central Goods and Services Tax Act, 2017, Integrated Goods and Services Tax Act, 2017, Union Territory Goods and Services Tax, 2017 and the Goods and Services Tax (Compensation to States) Act, 2017. The Central Goods and Services Tax Act, 2017 has the transitional provisions, vide Chapter XX, contained in Sections 139 to 142 which enables the assessee to migrate from the old indirect tax regime to the present GST system. It is stated that the condition that is imposed by Clause (iv) of sub-section (3) of Section 140 is arbitrary and discriminatory in nature

inasmuch as it prohibits the availment of CENVAT credit for the stock lying in the warehouse on which the petitioner was eligible to pass on the credit to the customers under the provisions of the Central Excise Act, 1944. It is submitted that there was no such restriction under the existing law which restricted non-availment of CENVAT credit by the first stage dealer where the invoice is dated earlier to twelve months preceding the appointed day. It is submitted that had this law, namely, the Central Excise Act, 1944 continued, there would have been no restriction on the petitioner-assessee to continue to sell the goods to the customers and pass on the credit irrespective of whether they had purchased the goods earlier to twelve months preceding the appointed day of 1-7-2017 or not.

15. It is in these circumstances that the petition is filed and in this petition the prayer is to declare that part of the law, namely, Clause (iv) of sub-section (3) of Section 140, as unconstitutional, *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India and unenforceable *qua* the first stage dealer.

16. To this petition, an affidavit in reply has been filed after notice of the same was served on the Attorney General. The affidavit is filed by the Commissioner of Central Tax (GST), Pune-1.

17. It is stated that the petitioner has challenged a policy decision taken by the Parliament which is not subject to judicial scrutiny. It is stated that the challenge is completely misconceived and untenable. It is stated that in the Value Added Tax, there is a restriction on availing of such credit. The same cannot be provided on grounds of hardship or equity. The impugned provisions clearly restrict the CENVAT credit for the stock lying in the warehouse, as on 30-6-2017, only to the extent where the invoices or other prescribed documents issued are not earlier than twelve months preceding the appointed date, namely, 1-7-2017. Thus, a reasonable period of twelve months has been provided for availing of credit for such invoices or other prescribed documents. The writ petition is full of erroneous submissions and grounds. The decision taken is a conscious policy decision, that is to restrict the transition of

credit based on invoices/prescribed documents which are not more than a year old. This has been done to ensure a safeguard against potential misuse of availment of credit during the transition period by placing a restriction on availing credit based on documents which are not very old. There is no question of equity. There are similar restrictions and in place for manufacturers/service providers under the Fifth proviso to sub-rule (7) of Rule 4 of the erstwhile CENVAT Credit Rules, 2004. It is submitted that the power to restrict the flow of credit exists under Section 16(1) of the CGST Act. The Legislative intent is to grant input tax credit partially. The input tax credit provisions do not provide that all the taxes paid on all inputs should be available as credit. Some credits have been denied in the Act itself and to allow flexibility. The restrictions can be placed on availability of credit, as credit can be availed only as permitted by law. It is stated that the petitioner has erred in stating that the restriction/prohibition on taking of credit of CENVAT by a first stage dealer on the goods lying in stock where the invoice/prescribed documents are issued not later than twelve

months preceding the appointed date, is unreasonable and arbitrary. It is contended that a reasonable period of twelve months has been provided for availing of credit for such invoices or other prescribed documents. Further, input tax credit provisions do not provide that all taxes paid on all inputs should be availed as credit. Hence, the argument that there is a discrimination or there is unreasonableness, cannot be accepted. Thus, this whole affidavit proceeds on the footing that there is absolutely no substance in this challenge.

18. The two set of matters are argued by two different Counsel.

19. Mr. Nankani, learned Senior Counsel appearing for the writ petitioner in Writ Petition No.3142 of 2017 handed in a compilation of relevant documents. Mr. Nankani would submit that the object and purpose of the CGST Act is to levy a tax on all transactions involving supply of goods and services, except those which are kept out of the purview of the excise and CENVAT tax. The learned Senior Counsel would argue that the

CENVAT Credit Rules, 2004 are erroneously relied upon. The conditions for allowing CENVAT credit, as enlisted in Rule 4 of the CENVAT Credit Rules, 2004, and particularly sub-rule (7) thereof, would indicate that CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in Rule 9 is received. The Fifth proviso to this sub-rule is being relied upon but without any reasonable basis. It is submitted by the learned Senior Counsel that we should see these provisions in the backdrop of the object and that is to avoid the cascading effect. We must place reliance on the provision consistent with the object and purpose. It is submitted that merely because a new regime has been brought into force does not mean all the existing rights and conferred under the statute prevailing prior to the new law coming into force should be taken away. In other words, such of the restrictions and conditions as are now imposed cannot be said to be achieving the object and purpose or rather they have no nexus with the object sought to be achieved.

20. It is argued before us and with some vehemence that this condition and which is sought to be imposed ought to be viewed with reference to the time when the goods were cleared from the factory for use as demo machines. At that time, the excise duty was paid by the petitioner. When the goods were removed from the depot, there was no requirement to pay excise duty on the same. Now under the GST regime the petitioner will have to pay GST on the supply of these goods to the customers/dealers. Thus, there will be a burden of double taxation on the same subject-matter. The GST will be levied by the Central Government as well as the levy would be on the transaction of supply of machines. Since the central excise duty has been subsumed under GST, there ought to have been availability of credit on the tax paid goods which have suffered central excise duty. However, by creating an arbitrary barrier of stock of goods, being less than an year old for claiming of credit, the law has violated the mandates of Articles 14, 19(1)(g) and 265 of the Constitution of India.

20th March, 2018

21. These contentions have been adopted but with several additions by the petitioner in Civil Writ Petition No.12378 of 2017.

22. Mr. Raghuraman, learned Counsel appearing for the petitioner would submit that in the petition which he is arguing, we must note, firstly, the factual difference. The factual difference being that the petitioner is a first stage dealer duly registered under the Central Excise Rules, 2002. The petitioner has been filing quarterly return periodically wherein the details are given and particularly set out at page 64 of the petition. Thus, there is description of goods, central excise tariff number, quantity of excisable goods and the amount of duty.

23. It is, therefore, argued by Mr. Raghuraman that we must peruse the Constitution's 101st Amendment Act, 2016 which brought into effect the CGST Act, 2017 and the transitional provisions. He would submit that the petitioner had divided the grounds of challenge under distinct heads. The argument is that though the provisions allow the petitioner to

take credit of CENVAT on the goods lying in stock as on 30-6-2017, subject to certain specified conditions, those conditions and particularly introducing a limit of one year is arbitrary. To that extent, he adopts the argument of Mr. Nankani but elaborates it by urging that the petitioner is a first stage dealer, as defined in Rule 2(ij) of the CENVAT Credit Rules, 2004. The petitioner is eligible to avail CENVAT credit on the goods purchased by them either from the manufacturer or importer. The petitioner being the first stage dealer is termed as an assessee within the meaning of Rule 2(c) of the Central Excise Rules, 2002. Thus, a registered person who stores excisable goods is also termed as an assessee. He can pass on the credit to the customers. After inviting our attention to Rule 10 of the Central Excise Rules, 2002, it is urged that the petitioner is required to maintain the inventory of open stock, goods purchased, goods removed and closing stock along with duties payable on the said goods. This was maintained in the format of RG 23D. Further, they were also filing quarterly returns regularly as per Rule 12 of the Central Excise Rules, 2002.

Further, it is submitted that the provisions of Rule 11 of the Central Excise Rules, 2002, for removal of goods from a factory or a warehouse under an invoice, shall apply *mutatis mutandis* to the first stage dealer. It is urged that as a first stage dealer, the petitioner had been purchasing various goods and passing on the credit of duty paid on the said goods to the customers by issuing invoice under the provisions of Rule 12 of the Central Excise Rules, 2002. In the scheme of the Central Excise Act, 1944 and the Rules framed thereunder, there was no restriction or prohibition on taking or carrying forward the CENVAT credit on the goods purchased by the first stage dealer irrespective of when the goods have been purchased. It is urged that the period of purchase of goods was not relevant as long as the first stage dealer satisfies the conditions under the CENVAT Credit Rules, 2004 such as receipt of goods by the dealer and specified duty paid documents. In the circumstances, to introduce prohibition on taking of credit on the goods lying in stock as on the appointed date of 1-7-2017 would seriously prejudice the petitioner. No loss or prejudice would be caused to the

respondents if the credit is allowed even for the documents which were issued more than one year back, as the said goods are duty paid. On account of continuing recession in the industry, further made worse by the demonetisation, stocks could not be sold for a considerable length of time. The stipulation would, therefore, render the provision discriminatory, unreasonable and violative of the mandate of Article 14 of the Constitution of India. All the more, when the CGST contains elaborate provisions enabling availing of input tax credit. It is inexplicable, therefore, why the present provisions and challenged in the petition differentiates between the manufacturer who was paying excise duty under the erstwhile Central Excise Act, 1944 without any time limit whereas the dealers are subjected to different treatment. This is not in consonance with the object and purpose of the CGST Act. The impugned provisions also violate the mandate of Article 19(1)(g) of the Constitution of India. That is subjected to only reasonable restrictions but the restrictions as prescribed, cannot be termed as reasonable.

24. Inviting our attention to Section 174 of the CGST Act, 2017, it is urged that this provision saves the rights and privileges accrued under the existing law. The argument is that the right to avail CENVAT credit is a matter of right accrued under the repealed Act, namely, the Central Excise Act, 1944. Once the right is accrued, the new enactment or repeal of the old Act cannot debar or disentitle the petitioner of the accrued right. It represents a vested right accrued or acquired by the petitioner under the existing law. It is in these circumstances, taking away such a right would be violative of the mandate of Article 300A of the Constitution of India.

25. Then it is urged that the first stage dealers were specifically eligible to pass on the CENVAT credit to their customers by issuing invoices with excise duty as per Rule 11 of the Central Excise Rules, 2002. Once they were so entitled, the prohibition on taking the credit for the purchases made prior to one year preceding the appointed day would wipe out the entire CENVAT credit on the goods which had been purchased/imported. Consequently, the petitioner's eligibility to

pass on the CENVAT credit of the goods purchased/imported prior to 1-7-2016 is effaced.

26. The other argument of Mr. Raghuraman is that the impugned provisions are hit by the doctrine of promissory estoppel. It is claimed that there was an entitlement to transfer the credit of all goods purchased by the petitioner from time to time once they were registered under the Central Excise Law. If that right of the petitioner, as enumerated above, is taken away only on the strength of the transitional provision, then, even the principle of promissory estoppel would come into play. For all these reasons, it is submitted that the writ petition be allowed. Mr. Raghuraman has handed over a compilation for our perusal which would include the relevant legal provisions and the case law point-by-point.

27. Mr. Raghuraman *inter alia* relied upon the Judgment of the Hon'ble Supreme Court and a very recently delivered and reported in **(2017) 9 SCC 1**. This is a Judgment delivered on the point of constitutionality and validity of Triple Talaq {**Shayara**

Bano v. Union of India & Others}. It is submitted that in this Judgment the arbitrariness of the legislation is taken to be very much a facet of unreasonableness in terms of Article 19(2) to (6) and there is no reason why arbitrariness cannot be raised to strike down the legislation under Article 14 of the Constitution of India.

28. Prior thereto, in support of the argument that Article 14 is salutary in its application, it is urged that the Judgments in the compilation would throw light on these propositions canvassed. Our attention was specifically invited to a Judgment in the case of **Elcher Motors Ltd. v. Union of India**, reported in 1999 (106) E.L.T. 3 (SC). That is on the point that rights accrued during the existing law are specifically saved under Section 174 of the CGST Act, 2017, which would include the right to pass on the CENVAT credit and such an accrued right cannot, therefore, be taken away and in the manner done. On the point of promissory estoppel, our attention has been invited to several Judgments in the compilation and particularly the principle emerging from the Judgment in **Motilal Padampat**

Sugar Mills Co. Ltd. v. State of Uttar Pradesh & Others, reported in (1979) 2 SCC 409.

29. All the above contentions are repelled by the learned Additional Solicitor General. The learned Additional Solicitor General, Mr. Anil Singh, would argue that the impugned statutory condition does not take away the right to avail input credit. It is only a transitional provision. In all cases, other than these, Sections 16 and 18 would apply. Pertinently, there is no challenge to the constitutional validity of the substantive provisions.

30. Our attention has been invited by Mr. Anil Singh to the settled principle that insofar as economic legislation is concerned, the grounds on which its constitutionality can be challenged are extremely limited. In the sense, if that legislation incorporates a policy measure, then the wisdom thereof cannot be questioned by this Court. Mr. Anil Singh would submit that this matter is of a concession or relaxation. Nobody can claim a vested right in such measures evolved by the Legislature. It is

entirely for the Legislature to make a provision and restrict the benefit or concession or relaxation either to a class of persons or even if it extends to all, it can restrict the term or period or limit up to which the concession can be availed of. In the instant case, the period of twelve months is provided as a safeguard against potential misuse of availment of credit during the transition period by placing restriction on availing credit based on documents which are not very old. There is no concept as equality in Tax matters. Apart therefrom, similar restrictions had been in place on the manufacturers/service providers under the Firth proviso to sub-rule (7) of Rule 4 of the erstwhile CENVAT Credit Rules, 2004. It is also argued by Mr. Anil Singh that when in a Value Added Tax there was a restriction on availing of credit in law, now, there is a substantive provision in the new law. However, it is only the transitional provision which inserts or incorporates the above condition, as the Legislature deemed it fit and proper to enforce the new regime from 1-7-2017. When the new regime replaces a bundle of legislations seeking to tax the activity of manufacturers, sales and extension of service,

then, it was deemed fit and proper that the transition to the new regime, from the old one, should be smooth. For it to be smooth and proper, a restriction has been placed on availment of CENVAT credit during the transitional period and by making the above statutory prescription. Mr. Anil Singh would submit that it is entirely for the Legislature to make such a provision and its power in that behalf is not questioned. If there is no challenge to the impugned condition on the ground of competence of the Legislature, then, the competent Legislature could have made a restrictive provision and which is precisely the intent. The transition from the old regime to the new one should be smooth and expedient. Hence, a reasonable period of twelve months has been provided. Why it is only twelve months and why it does not date back to the stage, the petitioners in these petitions would deem it fit and proper, is not the test which can be evolved and applied for considering the constitutionality of the legislation. Ultimately, it is the Legislature which is the best Judge and in its wisdom, insofar as fiscal policies are concerned, it has imposed this condition. That is, therefore, reasonable and as explained in

the affidavit in reply. On all counts, therefore, the challenge is devoid of merits according to Mr. Anil Singh and it deserves to be repelled.

31. Mr. Singh also handed over to us a compilation of the Judgments relied upon by him. In particular, he relied upon the principle laid down in **Trimbak Damodhar Raipurkar v. Assaram Hiraman Patil and others**, reported in AIR 1966 SC 1758. Mr. Singh's argument is that this Judgment makes a distinction between an existing right and a vested right. Similarly, where a statute operates in future, it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. In such circumstances and by relying on the Judgments in the case of **N.K. Bajpai v. Union of India & Another**, reported in (2012) 4 SCC 653 and **Virender Singh Hooda & Others v. State of Haryana & Another**, reported in (2004) 12 SCC 588, it is urged that the writ petitions be dismissed.

32. Mr. Raghuraman sought to rejoin to these submissions of the learned Additional Solicitor General by

urging that the input tax credit under the GST is an integral part of the GST law. It cannot be termed as a concession by the Government. Further, the attempt is to harmonise the indirect tax structure across the country. In the Constitution 122nd Amendment Bill, 2014, the Objects and Reasons clearly set out that it is intended to remove the cascading effect of taxes and to bring out a nation wide taxation system. Therefore, there is a clear intention to have input tax credit as a nationwide objective at the Constitutional level. Hence, all the decisions prior to the CGST would not be applicable to the extent they term this as a concession. In this regard, he would read out certain paragraphs from the Statement of Objects and Reasons and heavily rely upon the principle that assuming, but without admitting, that input tax credit was in the nature of concession granted by the Government, but such concession has already been availed of by the petitioners on all the goods held in stock as on 30-6-2017. The concession of input tax credit has been availed and the same has crystallised as a vested right in view of Section 174, sub-section (2) Clause (c) of the CGST Act, 2017. Such vested right

cannot be taken away by retrospective/retroactive amendment. In that regard, our attention has been invited to the Judgment of the Hon'ble Supreme Court in the case of **Jayam & Company v. Assistant Commissioner & Another**, reported in (2016) 15 SCC 125.

33. Finally, it is urged that transitional credit is a credit which has crossed the threshold under the proviso to Rule 4(7) of the CENVAT Credit Rules, 2004. The stage of concession has crossed and it has become a vested right. Hence, Section 140(3) of the CGST Act is not *pari materia* to Rule 4(7) of the CENVAT Credit Rules, 2004. The Rule 4(7) deals with fresh credits and not transitional credits. Further, in the CENVAT Credit Rules and later in point of time relating to transitional credits, no time restrictions are laid down. Insofar as the CGST Act is concerned, Section 18(2) is in *pari materia* with Rule 4(7) of the CENVAT Credit Rules, 2004. Both deal with fresh credits. Therefore, the comparison is erroneous.

34. Heavy reliance is placed on the Judgment of **Elcher Motors** (supra) wherein it was held that credit is a indefeasible right.

35. An attempt was made by Mr. Anil Singh to rely upon the Judgments in the case of **Osram Surya (P) Ltd. v. Commissioner of Central Excise, Indore**, reported in 2002 (142) E.L.T. 5 (SC) and **Samtel India Ltd. v. Commissioner of Central Excise, Jaipur**, reported in 2003 (155) E.L.T. 14 (SC). Mr. Raghuraman submitted that these were cases of fresh availment of credit and not accumulated or transitional credit. In these Judgments it was clarified that the legality or validity of the Rules was never questioned and in any event the sub-rule impugned therein did not operate retrospectively. In the sense, it did not cancel the credits nor it affected the rights of those persons who have already taken the credit before coming into force of the impugned sub-rule. That operated prospectively in regard to those manufacturers who seek to take credit after the coming into force of this rule. Once the right was crystallised, became absolute and what is now brought about by the altered

provision affects it, then, this provision cannot be sustained are the grounds put forward by Mr. Raghuraman.

36. Mr. Raghuraman ended his arguments by submitting that there is no restriction for dealers in the Maharashtra GST Act, 2017 while the first stage dealer registered under the Central Excise Act is being discriminated by Section 140(3)(iv) of the CGST Act, 2017. In such circumstances, the plea raised of revenue loss or economic policy does not appear to be consistent.

37. For these reasons, it is submitted by Mr. Raghuraman that the writ petitions be allowed.

38. For properly appreciating the rival contentions, we must refer to the Central Goods and Services Tax Act, 2017.

39. The same is an Act to make a provision for levy and collection of tax of inter-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto. Chapter I contains preliminary

provisions. The Section 2 is a definition section and unless the context otherwise requires, the definitions would operate. By Section 2, Clause (21), the term “central tax” is defined to mean central goods and services tax levied under Section 9. The expression “existing law” is defined in Section 2, Clause (48) to mean any law, notification, order, rule or regulation relating to levy and collection of duty or tax on goods or services or both passed or made before the commencement of the Act by Parliament or any Authority or person having the power to make such law, notification, order, rule or regulation. The term “input service” is defined in Section 2, Clause (60) to mean any service used or intended to be used by a supplier in the course or furtherance of business. The term “input” is defined in Clause (59) of Section 2 to mean any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business. The term “input tax” is defined in Section 2, Clause (62) and the term “input tax credit” is defined in Clause (63) to mean the credit of input tax. The expressions “invoice” or “tax invoice” mean tax invoice referred to in Section

31 {see Section 2, Clause (66)}. The terms “job work” and “manufacture” are defined in Section 2, Clause 68 and 72 and the expressions “output tax” and “outward supply” are defined in Section 2, Clause 82 and 83. The word “recipient” is defined in Section 2, Clause (93) as recipient of supply of goods or services or both, to mean the person liable to pay the consideration for the supply of goods or services or both where a consideration is payable for it and where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available, and where no consideration is payable for the supply of a service, the person to whom the service is rendered. The term “registered person” is defined in Section 2, Clause (94) to mean a person who is registered under Section 25 but does not include a person having a Unique Identity Number. Then there are various words/terms which are defined and there are in all 121 Clauses to Section 2. Chapter II deals with administration and therein falls Section 9, which reads as under:-

*"**9**. (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent, as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.*

(2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The central tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

> *Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:*
>
> *Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax."*

The marginal heading of this provision is levy and collection. By Section 11, there is a power to grant exemption from tax and vesting in Government. Chapter IV is titled as Time and Value of Supply and contains Sections 12 to 15, whereas Chapter V is titled as Input Tax Credit. The Section 16, falling in Chapter V, reads as under:-

> *"**16.** (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.*
>
> *(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,–*

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation.- For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him

> *of the amount towards the value of supply of goods or services or both along with tax payable thereon.*
>
> *(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961, the input tax credit on the said tax component shall not be allowed.*
>
> *(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier."*

40. A perusal of this Section would enable us to hold that, every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in Section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

41. The sub-section (2) opens with a non-obstante clause and says that no registered person shall be entitled to the credit

of any input tax in respect of any supply of goods or services or both to him unless, he satisfies or complies with Clauses (a), (b), (c) & (d) to sub-section (2). The sub-section (3) says that, where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961, the input tax credit on the said tax component shall not be allowed. Importantly, by sub-section (4) of Section 16, it is stated that a registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

42. So much therefore for the argument that input tax credit in the new regime is unconditional or without any restriction. Thus the conditional input tax credit, as can be availed of and strictly within the four corners of the statute,

particularly the substantive provisions, is not questioned nor the validity and legality of these provisions put in issue. Pertinently, by Section 17 apportionment of credit and blocked credits is dealt with and by Section 18, the availability of credit in special circumstances is provided. There as well as sub-section (1) of Section 18 says that it is subject to such conditions and restrictions as may be prescribed. By sub-section (2) of Section 18, it is evident that a registered person shall not be entitled to take input tax credit under sub-section (1) in respect of any supply of goods or services or both to him after the expiry of one year from the date of issue of tax invoice relating to such supply. By Section 19, taking input tax credit in respect of inputs and capital goods sent for job work is dealt with and by Section 20, the manner of distribution of credit by Input Service Distributor is provided for. The manner of recovery of credit distributed in excess is set out in Section 21. Chapter VI of the legislation is titled as Registration and persons liable for registration, persons not liable for registration, compulsory registration in certain cases, procedure for registration, deemed registration, special

provisions relating to casual taxable person and non-resident taxable person, amendment and cancellation of registration ending up to its revocation. These matters are covered by this Chapter, which contains Sections 22 to 30.

43. Chapter VII is titled as Tax Invoice, Credit and Debit Notes. The Section 31 and the provisions following it would enable the person concerned to place himself in a position so as to avail of the benefits of the legislation, including the input tax credit. A comprehensive chapter titled as Accounts and Records is inserted (Chapter VIII).

44. Chapter IX is titled as Returns and the whole mechanism of filing it is set out therein. Chapter X provides for Payment of Tax and Chapter XI deals with Refunds. Chapter XII titled as Assessment contains the provisions enabling assessment of levy/tax. Chapter XIII is titled as Audit and Chapter XIV is titled as Inspection, Search, Seizure and Arrest. Chapter XV is titled as Demands and Recovery and which contains provisions would enable the Legislature to indicate the liability to pay in

certain cases (Chapter XVI). There is a special chapter for advance ruling, namely, Chapter XVII. Then follows the adjudicatory mechanism of appeals and revision carved out by Chapter XVIII. We have then Chapter XIX titled as Offences and Penalties and which contains Sections 122 to 138. Chapter XX is titled as Transitional Provisions. The Section 139 is dealing with migration of existing tax-payers and on and from the appointed day, every person registered under any of the existing laws and having a valid Permanent Account Number shall be issued a certificate of registration on provisional basis, subject to such conditions and in such form and manner as may be prescribed, which unless replaced by a final certificate of registration under sub-section (2), shall be liable to be cancelled if the conditions so prescribed are not complied with. The final certificate of registration shall be granted in such form and manner and subject to such conditions as may be prescribed and thus that aspect is taken care of by sub-section (2) of Section 139 and what are the consequences of a provisional registration being cancelled are set out in sub-section (3) of Section 139. Such

person shall be treated as not liable to registration under Section 22 or Section 24.

45. Then comes Section 140 with all its sub-sections and that reads as under:-

> *"**140.** (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:*
>
> *Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:-*
>
> *(i) where the said amount of credit is not admissible as input tax credit under this Act; or*
>
> *(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or*
>
> *(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.*
>
> *(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:*

Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation.– For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,-

(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is not paying tax under section 10;

(iii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1.- For the purposes of sub-sections (3), (4) and (6), the expression "eligible duties" means–

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978;

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985; and

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001,

in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

Explanation 2.- For the purposes of sub-section (5), the expression "eligible duties and taxes" means–

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975;

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975;

> *(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978;*
>
> *(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;*
>
> *(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985;*
>
> *(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001; and*
>
> *(viii) the service tax leviable under section 66B of the Finance Act, 1994,*
>
> *in respect of inputs and input services received on or after the appointed day."*

A bare perusal thereof would indicate that transitional arrangements for input tax credit are set out therein. Pertinently, sub-section (1) deals with a registered person, other than a person opting to pay tax under Section 10. He shall be entitled to take, in his electronic credit ledger, the amount of CENVAT carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed. The proviso to sub-section (1), however, says that the registered person shall not be allowed to take credit in the

circumstances set out therein. By sub-section (2), a registered person, other than a person opting to pay tax under section 10, his availment of input tax credit of the unavailed CENVAT credit in respect of capital goods is dealt with. Pertinently, there as well, the proviso imposes conditions.

46. None of these sub-sections are challenged and by the class of persons covered therein. They have understood that the transitional arrangements are in place and by their very nature they enable transition from one law to another smoothly. During such period, arrangements are made for input tax credit. They seem to be not complaining even when their right, if any, to avail of this credit and which is unavailed of, is restricted and not unconditional. By sub-section (3), a case dealt with is of a registered person but who was not liable to be registered under the existing law or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of Notification No.26/2012, dated 20-6-2012 or a first stage dealer or a second stage dealer or a registered importer or a

depot of a manufacturer, and he shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, subject to the conditions inserted in Clauses (i) to (v). Out of all those who have been brought within the transitional arrangements for availing input tax credit, it is only some of them particularly the first stage dealer or a depot of a manufacturer who seem to question the stipulation in Clause (iii) of sub-section (3) of Section 140. They are happy with the other clauses for they know that inputs or goods used or intended to be used for making taxable supplies under this Act meaning the CGST Act, the registered person under the CGST Act is eligible for input tax credit on such inputs under the CGST Act and would alone be able to avail of the benefit and carved out by sub-section (3) of Section 140. They are unhappy with the condition stipulated in Clause (iv) where the registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs but not

with condition No.(v), namely, the supplier of services is not eligible for any abatement under this Act means the CGST Act. They are not unhappy with the proviso either.

47. All that the impugned Clause (iv) does is that it tells the registered person who is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs that such invoices or other prescribed documents ought be issued not earlier than twelve months immediately preceding the appointed day. Pertinently, the transitional provisions relating to job work, miscellaneous transitional provisions and other provisions of the law are not questioned. There are various other compliances which have to be made by the law which is now brought in and equally they are not questioned. In this behalf a reference can usefully be made to Section 140(4), (5), (6) and pertinently the Clauses of sub-Section 6 which contain similar conditions. The persons covered therein are not aggrieved nor are complaining about the conditions or restrictions all of which are to be found in a Taxing Statute. Secondly, they are inserted in a transitional provisions.

Thirdly, while judging their legality and validity we are bound by the settled legal principles. In the case of *P. M. Ashwathanarayana Setty and Others vs. State of Karnataka and Others* reported in **AIR 1989 SC 100** and in the case of *Kerala Hotel and Restaurant Association and Ors. vs. State of Kerala and Ors.,* reported in **AIR 1990 SC 913** the principles are summarised as Under:

AIR 1989 SC 100

"30. The problem is, indeed, a complex one not free from its own peculiar difficulties. Though other legislative measures dealing with economic regulation are not outside Article 14 it is well recognised that the State enjoys the widest latitude where measures of economic regulation are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it PG NO 188 should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the Legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustments of an economic measure are available, the Legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or that there were better ways of adjusting the competing interests and claims. The Legislature possesses the greatest freedom in such areas. The analogy of principles of the burden of tax may not also be inapposite in dealing with the validity of the distribution of the burden of a `fee' as well.

AIR 1990 SC 913

24. The scope for classification permitted in taxation is greater and unless the classification made can be termed to be palpably arbitrary, it must be left to the legislative wisdom to choose the yardstick for classification, in the background of the fiscal policy of the State to promote economic equality as well. It cannot be doubted that if the classification is made with the object of taxing only the economically stronger while leaving out the economically weaker sections of society, that would be a good reason to uphold the classification if it does not otherwise offend any of the accepted norms of valid classification under the equality clause."

48. Section 174 and which is heavily relied upon repeals the earlier law and saves what is set out therein. The Section 174 reads as under:-

"174. (1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and the Central Excise Tariff Act, 1985 (hereafter referred to as the repealed Acts) are hereby repealed.

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not-

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;

(f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.

> *(3) The mention of the particular matters referred to in sub-sections (1) and (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal."*

49. Thus, the repeal of the Acts mentioned in sub-section (1) of Section 174 would not affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders made under such repealed or amended Acts. That is saved and except the proviso below sub-section (2) of Section 174.

50. Ordinarily, the expression "accrued right" means a matured right, a right that is ripe for enforcement (as through) {See: the Advanced Law Lexicon by P. Ramanatha Aiyar.}. The expression "vested right" means an absolute or indefeasible right.

51. It is too well-settled that right to take advantage of a statutory provision cannot be said to be an accrued right and similarly a right which would, if allowed to be asserted, will affect adversely the larger public interest that cannot be permitted to be enforced. {See in this context the decision of the Hon'ble Supreme Court reported in ***(2004) 1 SCC 663 [Howrah***

Municipal Corporation & Others v. Ganges Rope Co. Ltd. & Others]}**.** In this context, a useful reference can be made to the Judgment of the Hon'ble Supreme Court in the case of *Kanya Ram and Others vs. Rajender Kumar and Others* reported in **AIR 1985 SC 371**. The observations in paragraph 10 are very pertinent and the same reads as under:

> "10. Much reliance was placed on the decision of this Court in Rameshwar's case, supra, but it is clearly distinguishable on facts. There, the Court was dealing with a case where the tenants who had applied for purchase of their holdings under Section 18(1) of the Act had in compliance with the order made by the Prescribed Authority in their favour, made the requisite deposit of the first instalment of the purchase price as required by Section 18(4)(a) and thereupon were deemed to have become owners of the lands by reason of the legal fiction contained in Clause (b) thereof, The Court was therefore dealing with a case where the tenants had acquired a vested right to purchase the lands and the case had gone beyond the stage of a mere application under Section 18(1). The Court accordingly held that the death of Teja, the large landholder, during the pendency of the appeal before the Financial Commissioner, on the happening of which event inheritance opened resulting in his legal heirs becoming small landholders, would not nullify or annul the order made by the Prescribed Authority in favour of the tenant who had acquired a vested right to the grant of relief on the day they made their application under Section 18(1) of the Act. The observations made by Krishna Iyer, J. that the right of parties are determined by the facts as they exist on the date the action is instituted must be read in the context in which they were made and do not lay down any rule of universal application. The decision in each case must depend on its own facts. In the present case, Harditta Ram, the predecessor-in-title of the appellants, when he made the application for purchase under Section 18(1) of the Act,

> had a mere hope or expectation of, or liberty to apply for acquiring a right, and not a 'right acquired or accrued' under Section 18(1). It has been held ever since the leading case of Abbot v. Minister for Lands LR (1895) AC 425 that a mere right to take advantage of the provisions of an Act is not an accrued right. Abbot's case has been followed by this Court in a number of decisions. In such a situation, the Court is bound to take into consideration the subsequent events and mould the relief accordingly. The decision in Rameshwar's case clearly turned on the legal fiction contained in Section 18(4)(b) of the Act and the death of the large landholder Teja during the pendency of the appeal before the Financial Commissioner on which inheritance opened and his legal heirs became small landholders, could not impair the vested rights acquired by the tenants by virtue of the order passed by the Prescribed Authority and the deposit by them of the first instalment of the purchase price as required under Section 18(4)(a)."

52. We are concerned in this case with an argument that the petitioners, be they a depot of a manufacturer or a first stage dealer, had secured a right to claim CENVAT credit or input tax credit. That right had accrued to them in terms of the existing law and that could have been claimed without any restriction or conditions. Once under the existing law no such preconditions were imposed for the enjoyment or availment of that right, then, the present regime which seeks to impose a condition which is unreasonable and arbitrary, therefore, would make the statutory provision violative of Articles 14 and 19(1)(g) of the Constitution of India.

53. What is asserted before us is a right and flowing from the provisions of the CENVAT Credit Rules.

54. Before that we must also refer to the Central Excise Rules, 2002, copy of which has been handed under a compilation by Mr. Raghuraman. The Central Excise Rules are referable to Section 37 of the Central Excise Act, 1944. These Rules precede the Central Excise (No.2) Rules, 2001. By these Rules and after the definitions what is contemplated is appointment and jurisdiction of Central Excise Officer, duty payable on removal, date for determination of duty and tariff valuation, and by Rules 6, 7 and 8, assessment of duty, provisional assessment and manner of payment. The further Rule and which is styled as Rule 8A enables payment in respect of specified goods on which excise duty has been imposed with effect from 1-3-2002. The Rule 9 deals with registration and every person, who produces, manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods or an importer who issues an invoice on which CENVAT credit can be taken, shall get registered. The Rule 10

obligates maintenance of daily stock account and Rule 11 provides for removal of goods on invoice. Thereafter, there are further provisions enabling filing of return, etc..

55. The CENVAT Credit Rules, 2004, after the definitions and particularly of the phrases “exempted goods”, “exempted service”, “final product” define “first stage dealer” to mean a dealer, who purchases the goods directly from the manufacturer under the cover of an invoice issued in terms of the provisions of Central Excise Rules, 2002 or from the depot of the said manufacturer, or from premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice, or an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice. The expression “input” is defined in Rule 2, Clause (k) to mean all goods used in the factory by the manufacturer of the final product, or any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and

goods used for providing free warranty for final products, or goods included in Clauses (iii), (iv) and (v) but excluding those set out in the definition. Similarly, the term “input service” is also defined. The Rule 3 enables availing of CENVAT credit and a careful perusal of Rule 3 would indicate that there are conditions for availing of the same. By sub-rule (2) of Rule 3 and which opens with a non-obstante clause, the manufacturer or producer of final products shall be allowed to take CENVAT credit of the duty paid on inputs lying in stock or in process or inputs contained in the final products lying in stock on the date on which any goods manufactured by the said manufacturer or producer cease to be exempted goods or any goods become excisable. Similar is the stipulation with regard to availing of CENVAT credit on input service. By sub-rule (4) of Rule 3, CENVAT credit is permitted to be utilised and with the provisos thereto. What then follows and which is relied upon is Rule 4 of these Rules. This Rule sets out conditions for allowing CENVAT credit. One of the conditions and which is heavily relied upon by the learned Additional Solicitor General is to be found in sub-

rule (7) of Rule 4. It is, therefore, evident that the fifth proviso to sub-rule (7) of Rule 4 would indicate that availment of CENVAT credit is conditional upon the satisfaction of all the provisos. Thus, there is a period stipulated for availment of this CENVAT credit. In addition thereto, there are conditions imposed for the availment.

56. To our mind, therefore, the learned Additional Solicitor General is right in his contention that a CENVAT credit is a mere concession and it cannot be claimed as a matter of right. If the CENVAT Credit Rules under the existing legislation themselves stipulate and provide for conditions for availment of that credit, then, that credit on inputs under the existing law itself is not a absolute but a restricted or conditional right. It is subject to fulfilment or satisfaction of certain requirements and conditions that the right can be availed of. It is in these circumstances that we are unable to agree with the Counsel appearing for the petitioners that the impugned condition defeats any accrued or vested right. It was never vesting in them in such absolute terms, as is argued before us. If the existing law

itself imposes condition for its enjoyment or availment, then, it is not possible to agree with the Counsel that such rights under the existing law could have been enjoyed and availed of irrespective of the period or time provided therein. The period or the outer limit is prescribed in the existing law and the Rules of CENVAT credit enacted thereunder. In the circumstances, it is not possible to agree with the Counsel appearing for the petitioners that imposition of the condition vide Clause (iv) is arbitrary, unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution of India.

57. We would refer to the Judgments which are heavily relied upon in this context. It is stated that the rights and privileges accrued during the existing law have been specifically saved under Section 174 of the CGST Act, 2017. If what are saved are the rights and privileges of the nature noted above, then it cannot be said *de hors* the conditions or *de hors* the restriction on availment or enjoyment of that right they have been saved by the CGST Act. In other words, if rights are conferred with conditions under the existing law, then, they are

saved by the CGST Act with such conditions and not otherwise. There must be clear provision to grant it otherwise than in terms of the existing Law or in other words, the restrictions or conditons on availment of that right are removed totally. No such provision has been brought to our notice. It is clear that if right to availment of CENVAT credit itself is conditional and not restricted or absolute, then, the right to pass on that credit cannot be claimed in absolute terms. It is argued that it is a vested right accruing to the petitioner.

58. In the case of Elcher Motors (supra), what was in issue before the Supreme Court must be noted. In Elcher Motors, the Three Judge Bench of the Supreme Court of India was concerned with the validity and application of the scheme, as modified by introduction to Rule 57F {read as 57F(4A)} of the Central Excise Rules, 1944, under which credit which was lying unutilised on 16-3-1995 with the manufacturers, stood lapsed in the manner set out in the provision. That was questioned.

59. The assessees argued that the Rule should be quashed because MODVAT credit lying in balance with the

assessee as on 16-3-1995 represents a vested right accrued or acquired by the assessee under the existing law and such right is sought to be taken away by the impugned Rule. The Central Government has no power under Section 37 of the Central Excise Act, 1944 or any other provision thereof to frame such a Rule. The impugned Rule is arbitrary and unreasonable as the same has been framed without due application of mind to the relevant facts and it has been exercised on the basis of non-existent facts or which are patently erroneous. Then, the argument was that Section 37 of the Act does not enable the Central Government to frame a Rule enabling the lapsing of the balance in MODVAT account and is, therefore, *ultra vires* the rule making power. The argument of the other side was that the impugned Rule is only a part of the scheme providing for giving concessions under the taxation enactment. That cannot be continued for all times to come and could be put to an end at any time.

60. In para 5 of this Judgment, the introduction was traced and it was held that if on the inputs the assessee had

already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto, then, the tax on these goods gets adjusted which are finished subsequently. Thus, a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Thus, this is a case where the Rule, as introduced, provided for total lapsing of that credit which was lying unutilised with the manufacturer on 16-3-1995. That was held to be impermissible within the scheme of the law. We are not considering here such a situation.

61. We are not confronted with a situation of the lapsing of the credit though the petitioners may equate the position before us with that of Elcher Motors. We are dealing with the validity and legality of a condition imposed in the transitional arrangement. While moving from one legislation to another comprehensive legislation, in the latter legislation the Legislature deemed it fit and proper to continue the earlier or erstwhile arrangement by terming it as a transition or

transitional one. That continuation was with conditions and one of the conditions which is questioned here is consistent with the conditions imposed under the existing law. Such a situation was not dealt with in Elcher Motors. Thus, the decision is clearly distinguishable.

62. Reliance is then placed on another decision in the case of **Jayam & Company** (supra). Once again we must see what was dealt with in Jayam & Company. The argument before the Hon'ble Supreme Court in Jayam & Company was whether sub-section (20) of Section 19 of the Tamil Nadu Value Added Tax Act, 2006 could be given retrospective effect. The appellants were dealers and registered as such under the provisions of the above VAT Act. They argued that they had dealt in electronic home appliances. They purchased them from local registered dealers on payment of VAT under the VAT invoice issued by the vendors. Thereafter, there was a resale to consumers under the VAT invoice charging appropriate VAT on their selling price. On resale, VAT is paid by the dealer. The dealer is entitled to avail input VAT credit and he is entitled to credit on VAT which was

paid to the vendors on purchase of TV sets from the vendors. What had happened was, after the original tax invoice and availing the input tax credit, the vendor gave a discount and purchase credit note was issued for a lesser price. The dealer took into account the price which it had paid to the vendor after adjusting the discount that was subsequently given to the dealer to arrive at net cost and adding VAT which was limited to the vendors by the dealers. The goods were resold at a lesser price. After the introduction of sub-section (20) in Section 19 and once again, which has a non-obstante clause, the obligation was to reverse the input tax credit. In other words, if the registered dealer sold goods at a price lesser than the price of the goods purchased by him, he had to reverse the amount of input tax credit over and above the output tax of those goods. It was such an issue which was considered and in considering that the definitions and substantive provisions of the Tamil Nadu Value Added Tax Act, 2006 were referred. The Supreme Court noted that input tax credit is a form of concession provided by the Legislature. It is not permissible to all kinds of sales and certain

specified sales are specifically excluded. The concession of input tax credit is available on certain conditions mentioned in this section, namely, Section 19 and one of the most important condition was that, in order to enable the dealer to claim that credit it has to produce the original tax invoice, complete in all respect, evidencing the amount of input tax. It is in these circumstances that the Hon'ble Supreme Court held that the challenge to the constitutional validity had to fail. It clearly held that when there was a concession given by the statute, the Legislature has to make provision stating the form and manner in which the concession is to be allowed and the sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of input tax credit but for Section 19 of the VAT Act. We, therefore, do not see how *de hors* this position a reliance can be placed only on some paras of this Judgment. We cannot ignore what was essentially decided. This is not a matter of retrospective operation of a fiscal statute, as was projected before us in the passing. This is a clear case as operating within the ambit of

Jayam & Company itself. As is before us, a concession is being provided by the Legislature which but for the provision granting such concession could have not been availed. The availment of CENVAT credit or input tax credit is clearly termed as a concession. With the conditions imposed, the concession could have been availed of. In the absence of a substantive provision granting such concession, there would have been no concession at all. Thus, one cannot pick and choose a condition for challenge by alleging that the availment is undisputedly conditional but one of the conditions, though having nexus with the availment, is unconstitutional or arbitrary and excessive. The nature of that condition, its placement consistent with the scheme is then conveniently ignored. We cannot allow this argument to be built on the basis of reliance on para 18 of the Judgment in Jayam (supra)

63. Once we take this view, we do not think that the Judgment in the case of **Shayara Bano** (supra) or some paragraphs therefrom can be of any assistance. True it is that arbitrariness in legislation is termed to be very much a facet of

unreasonableness, and arbitrariness can be used to strike down the legislation when it is challenged as violative of Article 14 of the Constitution of India. However, once we find nothing arbitrary in the legislation, then, we cannot take assistance of this principle. This is not a case where Article 14 can be invoked on the principle as is projected by Mr. Raghuraman.

64. He had also argued that just as equals cannot be treated as unequal, treating unequals equally also would be violative of the mandate of this Article. We are not concerned with such a situation here for the simple reason that in the transitional provisions possibly every person and who is going to be affected by the movement or transition to the new regime is included. In this transitional phase, some of the benefits and concessions derived under the existing law are protected but consistent with the conditions already imposed under the existing Law for their enjoyment. In these circumstances, we do not see how the principle as enunciated in **Shayara Bano** will be of any assistance.

65. Equally, we do not think that there is any merit in the argument that the Clause (iv) of Sub-Section 3 of Section 140 of the GST Act violates the principle of promissory estoppel. As is rightly contended before us, there cannot be a estoppel against a statute. Apart therefrom, we do not find any promise which was absolute and unconditional from inception having been breached or resiled by the Executive or the State. From inception, the concession or right based on the same was extended but with conditions. Now that the new regime has taken over and which does away with all the existing laws on the subject, then, in the transitional phase and for the transition to be smooth and proper necessary provisions are inserted in the New Law. With these in place, even the conditional arrangement under the existing laws is saved for a particular duration. To our mind, therefore, we do not see how when the imposition of the condition has a clear nexus with the object sought to be achieved, then, that can be termed as violative of the principle of promissory estoppel either. In this behalf a reference can usefully be made to the principles emerging from several

Judgments of the Hon'ble Supreme Court, particularly after M.P. Mills Case (supra). In the case of *Kasinka Trading and Anr. vs. Union of India and Anr.*, reported in **AIR 1995 SC 874** the Hon'ble Supreme Court summarised the legal position as under:-

> "12. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance of the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealing, which have taken place or are intended to take between the parties.
>
> 13. It has been settled by the Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make." There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the

doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspect including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.

14. The ambit, scope and amplitude of the doctrine of promissory estoppel has been evolved in this country over the last quarter of a century through successive decision of this Court starting with Union of India v. Anglo Afgan Agencies Pvt. Limited (AIR 1968 SC 718). Reference in this connection may be made with advantage to Century Spinning & Manufacturing Co. Ltd. and Anr. v. The Ulhasnagar Municipal Council and Anr. (AIR 1971 SC 1021); Motilal Padampat Sugar Mills Co. (P) Ltd. v. State of UP and Ors. (AIR 1979 SC 621); Jit Ram Shiv Kumar and Ors. etc v. State of Haryana and Anr. (AIR 1980 SC 1285); Union of India v. Godfrey Philips India Ltd. (AIR 1986 SC 806); Indian Express Newspapers (Bom) Pvt. Ltd. and Ors. v. Union of India and Ors. (AIR AIR 1986 SC 515); Pornami Oil Mills and Ors. v. State of Kerala and Anr. [1986] Supp. SCC 728 : Bakul Oil Industries and Anr. v. State of Gujarat and Anr. (AIR 1987 SC 142); Asst. Commissioner of Commercial Taxes & Ors v. Dharmendra Trading Co. and Ors. (AIR 1988 SC 1247); Amrit Banaspati Co. Ltd. and Anr. v. State of Punjab and Anr. (1992 AIR SCW 953 and Union of India and Ors. v. Hindustan Development Corporation and Ors. [1993] 3 JT SC 15. In Godfrey Philips India Limited (AIR 1986 SC 806) at page 816, para (14) (supra) this Court opined:

> "We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or Public authority to the promise of representation

> made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or Public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or Public authority should be bound by the promise or representation made by it."

In Excise Commissioner U.P. Allahabad etc. etc. v. Ram Kumar etc. etc. four learned Judges of this Court observed :

> "The fact that sales of country liquor had been exempted from sales tax vide Notification No. ST 1149/X-802 (33)- 51 dated April 6, 1959 could not operate as an estoppel against the State Government and preclude it from subjecting the sales to tax if it felt impelled to do so in the interest of the Revenues of the State which are required for execution of the plans designed to meet the ever increasing pressing needs of the developing society. It is now well settled by catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers."

Prof. S.A. De Smith in his celebrated treatise "Judicial Review of Administrative Action", 3rd Edn. at p.279 sums up the position thus : "Contracts and Covenants entered into by the Crown are not to be construed as being subject to implied terms that would exclude the exercise of general discretionary powers for the public good: On the contrary they are to be construed as incorporating an implied term that such powers remain exercisable. This is broadly true of other public authorities also. But the status and functions of the Crown in this regard are of a higher order. This Crown cannot be allowed to tie its hands completely by prior undertakings is as clear as the proposition that the Courts cannot allow the Crown to evade compliance with ostensibly binding obligations whenever it thinks fit: If a public authority lawfully repudiates or departs from the terms of a binding contract in order to have been bound in law by an ostensibly binding contract because the undertakings would improperly fetter its general

discretionary powers the other party to the agreement has no right whatsoever to damages or compensation under the general law, no matter how serious the damages that party may have suffered."

15. In Subhash Photographies v. Union of India (1993 AIR SCW 2871 para 14) Jeevan Reddy, J. Speaking for the Bench observed:

> "In Statutes like Customs Act and Customs Tariff Act one has also to keep in mind that such legislation can be properly administered only by constantly adjusting it to the needs of the situation. This calls for a goods amount of discretion to be allowed to the delegate. As is often pointed out 'flexibility is essential (in law-making) and it is one of the advantages of rules and regulations that they can be altered much more quickly and easily than can Acts of Parliament." We have pointed out hereinbefore the necessity of constant and continuous monitoring of the nation's economy by the Government (and its various institutions) and the relevance of these enactments as a means of ensuring a proper and healthy growth."

16. The learned Judge went on to opine (para 12 of AIR):

> "The Parliament has appointed two authorities i.e., Central Government and the Board to make rules/regulations to carry out the purposes of the Act generally. The character of Rules and of the Regulations made under Sections 156 and 157 respectively is the same - both constitute delegated legislation. The Regulations are subject to an additional limitation viz., they should not be contrary to the Rules made under Section 156. The purpose of Sub-section (2) in both the sections is inter alia to allocate certain matters to each of them exclusively; subject to these Sub-sections, both the delegates can exercise the power vested in them for carrying out the purposes of the Act. No established legislative practice of any consideration duration has been brought to our notice to read any further limitation into the regulation-making power under Section 157, assuming that a legislative practice can be read as a limitation."

17. In M.P. Sugar Mills case (supra) it was observed that the doctrine of promissory estoppel would not apply in the teeth of an obligation or liability imposed by law and that there can be no promissory estoppel against the exercise of legislative power.

.....

20. The facts of the appeals before us are not analogous to the facts in Anglo Afgan Agencies (AIR 1968 SC 718) (supra) or M. P. Sugar Mills (AIR 1979 SC 621) (supra). In the first case the petitioner therein had acted upon the unequivocal promises held out to it and exported goods on the specific assurance given to it and it was in that fact situation that it was held that Textile Commissioner who had enunciated the scheme was bound by the assurances thereof and obliged to carry out the promise made thereunder. As already noticed, in the present batch of cases neither the Notification is of an executive character nor does it represents a scheme designed to achieve a particular purpose. It was a Notification issued in public interest and again withdrawn in public interest. So far as the second case (M. P. Sugar Mills case) is concerned the facts were totally different. In the correspondence exchanged between the State and the petitioners therein it was held out to the petitioners that the industry would be exempted from sales tax for a particular number of initial years but when the State sought to levy the sales tax it was held by this Court that it was precluded from doing so because of the categorical representation made by it to the petitioners through letters in writing, who had relied upon the same and set up the industry.

21. The power to grant exemption from payment of duty, additional duty etc. under the Act, as already noticed flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the taxable event occurs. They are then subject to the payment of duty as prevalent on the date of the entry of the goods. An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of Customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of

customs duty etc., wholly or partially and subject to such conditions as may be laid down in the Notification by the Government in "public interest". Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification, in the "public interest", is an exercise of the statutory power of the State under the law itself as is obvious from the language of Section 25 of the Act. Under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner. From the very nature of power of exemption granted to the Government under Section 25 of the Act, it follows that the same is with a view to enabling the Government to regulate, control and promote the industries and industrial production in the country. Notification No. 66 of 1979 in our opinion, was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said Notification was not even intended as an incentive for import. The Notification on the plain language of it was conceived and issued on the Central Government "being satisfied that it is necessary in the public interest so to do." Strictly speaking, therefore, the Notification cannot be said to have extended any "representation" much less a "promise" to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It would bear repetition that in order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A Notification issued under Section 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from the said Notification. It is, therefore, futile to contend that even if the public interest so demanded and the Central Government was satisfied that the exemption did not require to be extended any further, it could still not withdraw the exemption.

22. The argument on behalf of the appellants, vehemently pressed by Mr.Ashoka Desai and Mr. Harish

Salve, their learned senior advocates, is to the effect that since the Notification 66/79 had itself indicated that it shall be operative till 31st March 1981, the Government could not withdraw the same before the expiry of the date. It was argued that the appellants had placed orders for the import of PVC resin relying upon the exemption Notification on the understanding that it was to remain operative till 31st March 1981 and had made arrangements for importing the goods accordingly and they could not be prejudiced by the withdrawal of that Notification before 31st March 1981. We cannot persuade ourselves to accept this submission of the learned Counsel. Merely by mentioning the date as 31st March 1981, as the date upto which the exemption Notification No. 66/79 was to be operative, no unequivocal representation could be said to have been made that it could not be rescinded or modified before that date even if the Government was satisfied that it was necessary in the public interest to rescind it. Since, the Notification had been issued under Section 25(1) of the Act, the very same power was available to the authority for rescinding or modifying that Notification and the appellant ought to have know that the said notification was capable of or liable to be revoked, modified or rescinded at any time even before the expiry of 31st March 1981 if the 'public interest' so demanded. To hold that after the Government had issued the notification 66/79 indicating that it was to remain operative till 31st March 1981, it could not be rescinded or modified before the expiry of that date would amount to prohibiting the Government from discharging its statutory obligation under Section 25(1) of the Act, if it was satisfied that it was in the "public interest" to withdraw, modify or rescind the earlier Notification. The plain language of Section 25 of the Act is indicative of the position that it is the public interest and public interest alone which is the dominant factor. It is not the case of the appellants that the withdrawal of Notification 66/79 by the impugned Notification was not 'public interest'. Their case, however, is that relying upon the earlier Notifications they had acted and the Government should not be permitted to go back on its assurance as otherwise they would be put to huge loss. The courts have to balance the equities between the parties and indeed the courts would bind the Government by its promise "to prevent manifest injustice or fraud." The following observations from Malhotra & Sons v. Union of

> India AIR (1976) J & K 41 have been noticed with approval by this Court in Excise Commissioner v. Ram Kumar and in M.P. Sugar Mills case (supra) :
>
> The courts will only bind the Government by its promises to prevent manifest injustice or fraud and will not make the Government a slave of its policy for all times to come when the Government acts in its governmental, public or sovereign capacity.
>
> The burden of customs duty etc. is passed on to the consumer and therefore the question of the appellants being put to a huge loss is not understandable. No injustice has been done much less fraud practised by the Government in withdrawing the exemption.
>
> 23. The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the Notification had been issued. The withdrawal of exemption "in public interest" is a matter of policy and the court would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bonafides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption Notification under Section 25(1) of the Act."

66. In fact, we have found from the scheme of the new law that the object and purpose sought to be achieved after its introduction of the new law is of not permitting the existing law arrangement to continue endlessly. Some day or some time has been stipulated as appointed day for the new regime to come

into force. For it to come into force and function effectively, the transitional arrangements have been made. They have clear nexus, therefore, with the object sought to be achieved. They cannot be struck down as having no such relation or nexus.

67. Thus, all the arguments are dealt with. We do not see how any of the above arguments and which have been canvassed and noted in extenso by us can be accepted. Once we are of the opinion that there is nothing indefeasible or absolute in the right claimed under the existing law or in transitional arrangements set out, or in the substantive provisions permitting availing of input tax credit, then, all the more the challenge must fail.

68. We cannot also by any comparative analysis of the Central and State Law hold that this condition, as imposed, is unreasonable.

69. For the aforesaid reasons, each of these petitions fail. Rule in each of them is discharged but without any order as to costs.

(PRAKASH D. NAIK, J.) (S.C. DHARMADHIKARI, J.)